

Defending Those People

ABBE SMITH*

I. INTRODUCTION

Delores¹ was the best friend of another client, an innocent woman who had served more than twenty-eight years in prison before she finally won her freedom.² A colleague asked me if I knew about the “One Friend” rule. I had no idea what she was talking about. “No,” I said. She explained, “When you represent a woman prisoner and manage to get her out, you have to make clear that you are willing to represent one friend of hers and one friend only.”

I laughed when I heard this. But she was right. Women prisoners tend to be loyal. The first client said she could not feel free while her friend Delores was still in prison.

Delores had been a devoted wife to her husband Bill. She was happily married, but sometimes felt lonely and isolated. She didn’t have many friends and had lost touch with family over the years. Bill worked a lot. When he wasn’t working he had his bowling league and golf. Delores and Bill wanted kids but couldn’t seem to have any. Delores got pregnant several times and gave birth without incident, but, one by one, the babies died.³ The doctors told her it was Sudden Infant Death Syndrome. They said she probably had a genetic predisposition for SIDS.⁴

She was arrested shortly after the last baby died, still reeling from the loss. The local prosecutor didn’t believe in babies just dying. Delores was a serial child murderer. He considered the idea that she had Munchausen Syndrome by Proxy, a pattern of behavior in which caregivers—especially mothers—exaggerate,

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¹ Names of clients and case details have been changed to protect client privacy, but the essential details of the stories in this essay are true.

² See generally ABBE SMITH, *CASE OF A LIFETIME* (2008) (telling the story of Patsy Kelly Jarrett, who was wrongly convicted of robbery and murder in upstate New York in 1976).

³ Her story reminds me of Aunt Sissy in *A Tree Grows in Brooklyn*. Aunt Sissy longed to be a mother and gives birth to ten babies, all of whom die at birth. See generally BETTY SMITH, *A TREE GROWS IN BROOKLYN* (1943).

⁴ Sudden Infant Death Syndrome (SIDS) is the unexplained death of an infant during sleep, possibly associated with brain abnormalities. See generally *Sudden infant death syndrome*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002533/> (last visited Aug. 2, 2011).

fabricate, or induce physical and/or mental health problems in others.⁵ But he didn't think she was mentally ill. He believed Delores was well aware of what she was doing and knew it was wrong,⁶ but killed her children for attention.

Delores's trial lasted only a few days. No medical or psychological experts testified on her behalf. When the jury found her guilty, she looked back at her husband in dismay. The judge gave her twenty to life. The prosecutor wanted more.

When Delores became eligible for release after twenty years, she had a hearing before the parole board. Despite the fact that she was often targeted for ridicule and abuse—baby killers are especially reviled in a women's prison—she had done her time without incident. She had participated in every prison program—educational, therapeutic, religious. For most of the twenty years, she had worked in the prison hospital as a nurse's aide. She had also worked in the Catholic chaplain's office. She was a woman of faith and service. She was denied parole because she showed “too little emotion” at the hearing.

Two years later she had her next hearing. She was now on the honors floor—a privilege given to inmates with exemplary disciplinary records. She was still working in the hospital and chaplain's office and participating in programs.

Delores had learned from the previous hearing that she could not afford to be reserved. She had learned to bury her feelings to endure her incarceration, but now had to reveal herself to a panel of criminal justice bureaucrats who would decide her fate.

This time she let the grief pour out of her—for her dead babies, her lost life. She was denied parole because she showed “too much emotion.”

Together with a few students and post-graduate fellows, I undertook Delores's representation after her second parole hearing. I did so partly as a kindness to my previous client, but also because Delores's was the kind of case we were interested in—a long-serving prisoner convicted of a serious crime who had done her time but might never get out.

⁵ See generally *Munchausen syndrome by proxy*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002522/> (last visited Feb. 21, 2011).

⁶ See generally ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967). The focus on knowing right from wrong comes from the *M'Naghten* Rule. Under the rule, a criminal defendant is not guilty by reason of insanity if, at the time of the alleged crime, she was so disturbed that she did not know the nature or quality of her actions, or did not know that what she was doing was wrong. See Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 16–18 (2007). The *M'Naghten* Rule is named for Daniel M'Naghten, who, in 1843, tried to kill the prime minister of England, Sir Robert Peel. M'Naghten thought Peel wanted to kill him, so he tried to shoot Peel first but instead killed Peel's secretary, Edward Drummond. Medical experts testified that *M'Naghten* was psychotic, and M'Naghten was found not guilty by reason of insanity. *Id.* at 15–16. The *M'Naghten* Rule has been adopted in some form in many jurisdictions in the United States. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *STATE COURT ORGANIZATION 2004 199–202* (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>.

Her account of the previous parole hearings was out of the movie *The Shawshank Redemption*.⁷ In *Shawshank*, “Red,” the character played by Morgan Freeman, appears before the parole board and is routinely denied parole, no matter what he says or how many years he serves. After forty years, the board finally grants him parole in 1967.

Parole Hearings Man: Ellis Boyd Redding, your files say you’ve served forty years of a life sentence. Do you feel you’ve been rehabilitated?

Red: Rehabilitated? Well, now let me see. You know, I don’t have any idea what that means.

Parole Hearings Man: Well, it means that you’re ready to rejoin society.

Red: I know what *you* think it means, sonny. To me it’s just a made up word. A politician’s word, so that young fellas like yourself can wear a suit and a tie, and have a job. What do you really want to know? Am I sorry for what I did?

Parole Hearings Man: Well, are you?

Red: There’s not a day goes by I don’t feel regret. Not because I’m in here, or because you think I should. I look back on the way I was then: a young, stupid kid who committed that terrible crime. I want to talk to him. I want to try and talk some sense to him, tell him the way things are. But I can’t. That kid’s long gone and this old man is all that’s left. I got to live with that. Rehabilitated? It’s just a bullshit word. So you go on and stamp your form, sonny, and stop wasting my time. Because to tell you the truth, I don’t give a shit.⁸

I thought it was cruel of the parole board to stir up Delores’s hopes by giving her a hearing every two years only to deny parole.

There’s another reason I was moved to take Delores’s case. Her husband Bill—who has stood by her all these years—paid a lawyer more than \$50,000 to draft a several-page letter for the last parole hearing. Not only did the lawyer bill Delores and her husband for her time, she charged them for every soda and candy bar she shared with Delores during the few times they met. One itemized bill included fifty cents for half a Snickers bar. It made me feel ashamed of my profession. I wanted to make it right.

⁷ THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994). The movie is based on a novella: STEPHEN KING, *Hope Springs Eternal: Rita Hayworth and Shawshank Redemption*, in DIFFERENT SEASONS I (1982).

⁸ THE SHAWSHANK REDEMPTION, *supra* note 7.

We hoped the third time would be the charm. We put together a detailed parole petition. We prepared Delores for the hearing, pushing her to dig deep on tough questions so the board would see she was capable of insight. We talked about “dissociation”—that this might explain why she had no clear recollection of what she was doing at the time of the baby’s death. We helped her to articulate what might have been going on.

This time Delores was denied parole because she “posed a danger to society” and her release would “diminish the seriousness of her crime.” These were the factors underlying the sentence she had more than served.

We are in the process of appealing the parole board’s decision. Delores knows not to be hopeful about this, but she can’t help it. She says that she just doesn’t want to die in prison.

* * * *

Ronnie was sixteen-years-old when he committed the crime—immature, impulsive, and full of adolescent rage. He couldn’t believe he had gotten kicked out of school again. His father was really going to let him have it this time.

When Ronnie grabbed his dad’s hunting rifle he figured it would scare the neighbor into giving him her car keys. He couldn’t escape any other way. He didn’t know how to hotwire a car or use a screwdriver. He barely knew how to drive.

Ronnie had never been in trouble with the law. He had never been to juvenile court, much less adult criminal court. But he had been in trouble at school. He did stupid stuff there. Half the time he didn’t even know why. He wrote graffiti on the walls and drew obscene pictures.

He was different. No matter how hard he tried to fit in he was hopelessly out of sync with other kids. They mocked and shunned him. So he created his own identity, his own world. He took to wearing a swastika pin on his jacket even though he didn’t really know what a Nazi was. He bought himself a copy of *The Rise and Fall of the Third Reich*⁹ to learn.

The crime was horrifying. When the neighbor, a mother of two, refused to give him her keys, Ronnie shot her. He said the gun just kept going off—bang, bang, bang. The woman died instantly. Her little girl was there. She was only five-years-old. She saw the whole thing, ran, and hid in her room. Ronnie followed her there. He shot at her door before taking off. The little girl called 911 and said, “Please come. My mommy is dead.”

Ronnie drove 300 miles to his grandfather’s house. He was arrested there the next day.

This trial lasted only a few days, too. The jury wept when the little girl testified. She held her father’s hand as she recounted what happened. No one paid much attention to the psychiatrist who said that Ronnie wasn’t in his right mind.

⁹ WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* (1960).

Ronnie's own parents sat just outside the courtroom during the trial. They held hands and read the Bible with other family members.

Ronnie was convicted of murder, attempted murder, and car theft. The judge gave him the maximum sentence—life plus forty-five years.

Twenty-eight years later, I went to see him in prison. Ronnie was forty-four-years-old. He hadn't seen a lawyer in a quarter century. Legal fees had taken his parents' savings; they ran out of money after his appeal. Ronnie said he had written 1200 letters to lawyers over the years. He didn't know why he kept count.

He had been badly brutalized by larger, older inmates in the first few years of his incarceration. He was then held in protective custody—more like solitary confinement—for many months. He had somehow learned to cope with prison life.¹⁰ He stayed out of trouble, went to Bible study, and had a few friends.

I saw Ronnie because a prison buddy of his wrote to me about him. I found this compelling—a prisoner writing about how another guy could really use a lawyer. I acknowledge the randomness of my client selection process, but I get a lot of prisoner mail and can't help everyone. I feel bad about saying no to so many; it is unlikely they will ever obtain representation at this stage. Ronnie's youth when he committed the crime, the length of time he had been in prison, and those 1200 letters all spoke to me.

He still looked sixteen—a forty-four-year-old teenager. His face was soft, his skin unlined and unweathered. I suppose this is because he had barely been in weather.¹¹ He was also un-tattooed, an unusual thing for a white male prisoner, especially an alleged neo-Nazi. He said he worked in the prison factory making blue jeans, prison uniforms, and license plates. He had a sense of humor about this last thing: a prisoner making license plates.

I asked whether he ever had visitors. He said his two brothers visited once a year on "family day." His mother used to come, but she moved to a distant state some years ago and now keeps in touch through letters. His father died early in Ronnie's incarceration.

¹⁰ This, too, reminds me of *The Shawshank Redemption*. Early on in Andy Dufresne's incarceration, Andy (played by Tim Robbins) is regularly brutalized by a gang of inmates called "the Sisters." As Red says:

I wish I could tell you that Andy fought the good fight, and the Sisters let him be. I wish I could tell you that—but prison is no fairy-tale world. He never said who did it, but we all knew. Things went on like that for a while—prison life consists of routine, and then more routine. Every so often, Andy would show up with fresh bruises. The Sisters kept at him—sometimes he was able to fight 'em off, sometimes not. And that's how it went for Andy—that was his routine. I do believe those first two years were the worst for him, and I also believe that if things had gone on that way, this place would have got the best of him.

THE SHAWSHANK REDEMPTION, *supra* note 7.

¹¹ See SMITH, *supra* note 2, at 196 (The author—in an attempt at humor—tells her long-serving innocent client that the up-side of years of incarceration was that the client's skin had absolutely no sun damage.).

I told him we'd try to help him but didn't want to raise his hopes. He said he knew he might never get out. He just didn't want to die in prison. He would be grateful for anything we could do for him.

* * * *

These are the kinds of cases that make people ask how criminal lawyers can defend "those people": a bad seed¹² who kills a young mother, and a not-so-young mother who kills her own children. Why spend one second on these monstrous criminals, much less vigorously advocate on their behalf?

Many practitioners and scholars have written perceptively about the motivations of criminal defenders.¹³ Some have written eloquently.¹⁴ I have my own body of work on this and related questions.¹⁵

¹² See *THE BAD SEED* (Warner Brothers 1956) (movie about the granddaughter of a serial murderer who seems to have no conscience and becomes a murderer herself); MAXWELL ANDERSON, *BAD SEED* (1955) (play on which the movie was based); WILLIAM MARCH, *THE BAD SEED* (1954) (novel on which the play and movie were based); see also Deborah Sontag, *Teenager's Path and a Killing Put Spotlight on Mental Care*, N.Y. TIMES, Aug. 3, 2011, at A1 (reporting about Pericles Clergeau, a troubled teenager who, in 2011, killed a staff member at a shelter in Lowell, Massachusetts). As the Pericles Clergeau story demonstrates, there is no such thing as a "bad seed." Instead, trauma usually plays a role in child violence:

Pericles started exhibiting emotional and behavioral problems at 4 or 5, not long after [his family] emigrated from western Haiti.

"When Pericles was mad, he would bang his head on the walls," said Mr. Clergeau, a taxi driver. "If you see his arm, you see the line of scars from when he'd bite, bite, bite himself."

Mr. Clergeau said Pericles was first hospitalized at 7 or 8 after "he beat a boy with a chair when the boy called him gay." He said Pericles celebrated his first communion on a psychiatric ward at Cambridge Hospital Doctors speculated that Pericles had been traumatized by witnessing violence in Haiti, his father said. He did not think that was true. Even so, Pericles's behavior came to mirror that of a small but intractable population of youths who, often based on trauma in their lives, are filled with rage that turns into violence.

Id. at A18. For a thoughtful examination of an abused and neglected child who killed two toddlers in England in the early 1970s, see GITTA SERENY, *CRIMES UNHEARD* (1998) (recounting the case of Mary Bell, who served her time, was given a new identity, and went on to raise a family).

¹³ See Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69 (Philip B. Heymann & Lance Liebman eds., 1988); CLARENCE DARROW, *THE STORY OF MY LIFE* (1932); ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (1982); DAVID FEIGE, *INDEFENSIBLE* (2006); JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" (1983); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1884); SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1981); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-84); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223 (1986); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993); see also Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339 (2006); James Mills, *'I Have Nothing to do with Justice'*, LIFE, Mar. 12, 1971, at 56.

¹⁴ See, e.g., DARROW, *supra* note 13; Babcock, *supra* note 13.

This essay is about why I have devoted my professional career—my life, really—to defending people most of society would just as soon banish and forget.¹⁶ After nearly thirty years of criminal law practice, my reasons are such a part of me they are nearly inarticulable. I am a criminal defender in my soul. But I have also been teaching and writing about criminal defense for almost as long as I've been doing it. I ought to be able to talk about it in a thoughtful and honest way. Let me try.

II. PEOPLE IN TROUBLE

I am drawn to people in trouble. Maybe this is because I had a little sister who was often in trouble. My sister had “problems” as a young child. Once, in kindergarten, she was finger-painting. When it was time to clean up and move to the next activity, the teacher said, “Okay, class. Time to put everything away.” My sister ignored her. The teacher approached my sister and, calling her by name, directed her to put the paints away. My sister kept painting. When the teacher repeated her request, my sister picked up her paint-covered hands and wiped them on the teacher’s dress.

I grew up intervening on my sister’s behalf, fighting her battles—at home, school, and in the neighborhood. Sometimes I literally fought for her. There was a red-haired boy named Alan who, in second grade, called my sister a name.¹⁷ I gave him a bloody lip, which got me sent to the principal’s office. This was my first and only visit to the principal. It was worth it.

¹⁵ See, e.g., SMITH, *supra* note 3; Abbe Smith, *Defending and Despairing: The Agony of Juvenile Defense*, 6 NEV. L.J. 1127 (2005); Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495 (2006); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004); Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL’Y 83 (2003); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999); Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869 (1997); Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances*, 1 CLINICAL L. REV. 723 (1995); Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1 (1993).

¹⁶ I have never had a capital murder case, so have no personal experience defending people that others would just as soon put to death, not merely banish. This is a reflection of the jurisdictions in which I have practiced. All but one didn’t have the death penalty when I practiced there. The one that had capital punishment didn’t allow public defenders to take homicide cases when I was there.

¹⁷ For example, saying someone had “cooties” was a popular playground taunt in the 1960s, usually leveled at someone of the opposite sex (as in “boy cooties” and “girl cooties”). It originally meant head lice. See HARPER LEE, *TO KILL A MOCKINGBIRD* 28–29 (1960) (Miss Caroline becoming terrified when a louse crawls out of Burris Ewell’s hair).

I don't think I've punched anyone since. I tend to fight my battles in court.¹⁸

From that point on, it wasn't a great leap to others in trouble. I mean "trouble" broadly, not just the kind my sister got in,¹⁹ or the kind that lands people in the criminal justice system. I feel a natural sympathy for people in difficulty or distress. It doesn't matter who they are. The fact that they are in trouble is what makes me want to defend them.²⁰

This is ironic since patience is generally not my strong suit—I can be brusque and dismissive. I am not known for my attention span—I tend to lose interest quickly (except when it's me who's talking, then I'm riveted). I have many more flaws: I can be a smart aleck, sarcasm is second nature, I don't suffer fools gladly.²¹ If I am any guide, you don't need to be the nicest person on earth to want to help people in trouble.

I am probably nicer to people in trouble than I am to ordinary people—even more so if I don't know them. No one should take from this kindness to strangers any great meaning, biblical or otherwise.²² I might be nicer to strangers only in comparison to people I know. I laugh when a friend or family member takes a pratfall. I can barely stop laughing long enough to help them up.

I seem to broadcast a certain receptiveness to trouble. I am regularly accosted and confided in by people with problems: on the street, in the subway, and at the grocery store. This is multiplied many times in the courthouse. It never fails: the anxious person with a summons, subpoena, or son in jail manages to find me. I don't know why this is.

¹⁸ See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 22 (4th ed. 2010) ("[T]he legal system . . . provides a socially controlled, non-violent process of dispute resolution. Lawyers play an indispensable part in that constructive social process.").

¹⁹ My sister went on to work with physically, emotionally, and intellectually disabled adolescents and adults, and earned a master's degree in social service administration.

²⁰ One of my criminal defense heroes was apparently the same way. Clarence Darrow's law partner once said that Darrow "would defend anyone who was in trouble." IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 355 (1941).

²¹ Again, I have excellent company in this particular flaw. See JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 11 (2011) (Clarence Darrow's most famous client Nathan Leopold saying, "[t]he only things Mr. Darrow hated were . . . cruelty, narrow-mindedness, or obstinate stupidity").

²² The Golden Rule is a little too Christian for this Jewish girl. See *Matthew* 7:12 ("So in everything, do unto others what you would have them do to you . . ."). But, of course, there is a Jewish version—involving the famous rabbi and scholar Hillel. In a well-known story, a gentile comes to Hillel and another rabbi and tries to provoke them by asking to be taught the whole Torah while standing on one leg. The other rabbi responds by whacking the man with a rod. Hillel responds by saying, "That which is hateful to you, do not unto another: This is the whole Torah. The rest is commentary—[and now] go study." Philologos, *The Rest of "The Rest is Commentary": On Language*, THE JEWISH DAILY FORWARD, Sept. 24, 2008, available at <http://www.forward.com/articles/14250/>. I am more inclined towards Tennessee Williams. For a discussion of the Jewish and Catholic underpinnings of criminal defense, see Smith & Montross, *supra* note 15.

Ordinarily, I am not terribly interested in “needy” people. I don’t have the stamina to weed through layers of need. But with people in criminal trouble there is a built-in narrative that draws me in—something happened and something else will happen to resolve it one way or another. It doesn’t need to be a serious or high profile crime for there to be a good story: A gripping tale of comedy, tragedy, *theater*.²³

A student and I recently represented a man I’ll call Lester Johnson, who was accused of shoplifting a pair of electric clippers from a CVS pharmacy. Even though the crime was captured on videotape, Mr. Johnson refused a plea for probation and insisted on going to trial. He was forty-nine-years-old. He had been in trouble in his youth, but not for years. He did a stupid, impetuous thing, but thought the store should have let him go when they recovered the clippers. He understood the system well enough to know that sometimes even clear-cut cases fall apart: witnesses don’t show up, evidence is lost. He wanted a trial or a dismissal.

It turned out the trial date fell on Mr. Johnson’s birthday.

When the government declared it was ready to go to trial—the store security guard was present, videotape in hand. Mr. Johnson said he was ready, too. It was unclear to me whether this was a matter of principle—the government should have to prove its case—or Mr. Johnson had backed himself into a corner by maintaining he wanted a trial.

I talked with him to try to understand exactly what his objectives were.²⁴ We didn’t have much time. We also didn’t have much privacy—as often happens we talked in the hall just outside the courtroom.²⁵ The judge had given the case a brief recess and would soon call us back.

Although the plea deal was off the table, Mr. Johnson still had the option of pleading guilty rather than going to trial. The judge who would hear the trial or plea was someone I’d appeared before many times. He was fair-minded. If Mr. Johnson pled guilty and expressed genuine regret at sentencing, I believed he would be sentenced to no more than a year of probation. But pointless, time-consuming litigation would surely test the judge’s good will. I explained this to Mr. Johnson. I made clear that we were prepared to go to trial if that’s what he wanted, but he should fully understand that a trial here would be more like a “slow guilty plea.”²⁶ If Mr. Johnson’s objective was to avoid jail, he should plead guilty. If his objective was to have his “day in court,” no matter the consequences, he

²³ See generally Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573 (2008).

²⁴ See DC RULES OF PROF’L CONDUCT R. 1.3 (2007) (“A lawyer shall represent a client zealously and diligently within the bounds of law . . . [and] shall not intentionally . . . [f]ail to seek the lawful objectives of a client through reasonably available means . . .”).

²⁵ As Lenny Bruce once said, “In the halls of justice the only justice is in the halls.” Stephen Robb, *The Comedy Master Turned Martyr*, BBC NEWS (Aug. 3, 2006), <http://news.bbc.co.uk/2/hi/entertainment/5241370.stm>.

²⁶ In criminal trial vernacular, a dead loser trial is also called a slow guilty plea.

should go to trial. I acknowledged that he might still receive probation if convicted at trial.²⁷

He remained adamant. We went back and forth, but, in the end, I told him it was his decision and we would go to trial.²⁸

I went to check on a case in another courtroom. By the time I returned, things had changed drastically. A busload of middle-school children had suddenly descended upon the courtroom where the shoplifting trial would occur. There must have been forty kids on some sort of field trip.

I grabbed Mr. Johnson and threw all that client-centered counseling²⁹ to the wind. Forget trial, I said. There's no way the judge won't make an example of you in front of all those children. He'll use you to teach them not to shoplift. He'll talk about how we all suffer when people steal: shops have to hire security, consumers have to pay higher prices, we are all under constant surveillance. But if you plead guilty—if you “man up” and throw yourself on the mercy of the court—the judge will be magnanimous. He will show those kids that judges have a heart when an accused takes responsibility for his actions and is contrite.

I didn't give him much of a choice; he went with the plea.³⁰ Mr. Johnson was so good during the plea and sentencing—he was honest and forthcoming, made no excuses, said he was ashamed of himself, and swore this would never happen again—the judge gave him only six months non-reporting probation.

When it was over, he threw his arms around me. He was delighted with the outcome. He said he couldn't thank me enough for saving his fiftieth birthday.

²⁷ Although judges are not supposed to impose a “trial tax”—that is, sentence a defendant more harshly after trial than at a plea—many do. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1158 (2008) (noting that the “distinction—between pleading guilty to avoid a trial tax on the exercise of constitutional rights and pleading guilty to avoid process costs—has led some critics to condemn plea bargaining while generally accepting guilty pleas”). Defenders are wise to advise clients that if they exercise their right to trial they will generally get more time. This is a natural consequence of the bargaining process. In pleading guilty, the defendant spares the state the expense of a trial and the risk of an acquittal, and spares the alleged victim certain emotional costs. See Bandes, *supra* note 13, at 340–41, 383–84 (discussing the emotional costs of criminal lawyering). Defendants who plead guilty get rewarded for this with a lighter sentence. This makes some sense, but there is often a great disparity between rejected plea offers and sentences after trial. If a case was worth three years before trial, it surely can't be worth a life sentence after. See SMITH, *supra* note 2, at 27, 29–30 (noting that Patsy Kelly Jarrett, a woman who rejected a pretrial plea offer of five to fifteen years—which would have meant three and a half more years than what she'd already done—ended up serving twenty-eight and a half years of a life sentence after trial).

²⁸ See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 192, Standard 4–5.2 (3d ed. 1993) (noting that certain decisions relating to the conduct of the case are ultimately for the accused, such as what plea to enter, whether to accept a plea offer, whether to waive a jury trial, whether to testify in his or her own behalf, and whether to appeal).

²⁹ See generally Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (discussing the history, development, and theory of client-centered lawyering).

³⁰ See MICHAEL CONNELLY, *THE FIFTH WITNESS* 303 (2010) (“She was scared, but she trusted me and that's about all you can ask from a client. The truth? No. But trust? Yes.”).

III. POOR PEOPLE, BLACK PEOPLE, AND UNDERDOGS

Most of those accused and convicted of crime are poor.³¹ Disproportionate numbers are nonwhite.³² There are now more black people currently under the control of the criminal justice system than were enslaved in 1850.³³ I suppose this is why “nobody really cares” about the quality of criminal justice in the United States,³⁴ or the fact that we currently lock up more people than any other nation on earth³⁵ in the “history of the free world.”³⁶ Who gives a damn about a bunch of poor, black people in prison?

³¹ See generally Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 32 (2011) (noting that the data shows that “poor people become defendants in criminal cases at a much higher rate than do non-poor people” and arguing the need for more data collection on poor defendants); see also JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (8th ed. 2006) (examining the connection between class and criminal justice in the United States); Babcock, *supra* note 13, at 184 (“[M]ost of those accused of crime are poor and often are minorities.”); Sharon Dolovich, *Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 254 (2009) (“[i]n the United States, inmates typically start out as poor people of color—poor African-Americans in particular”). For a classic description of the poor defendant whose case transformed criminal law practice in the United States by establishing the right to counsel, see ANTHONY LEWIS, *GIDEON’S TRUMPET* 5–6 (1964):

Gideon was a fifty-one-year-old white man who had been in and out of prisons much of his life. He had served time for four previous felonies, and he bore the physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair. He had never been a professional criminal or a man of violence; he just could not seem to settle down to work, and so he had made his way by gambling and occasional thefts. Those who had known him, even the men who had arrested him and those who were his own jailers, considered Gideon a perfectly harmless human being, rather likeable, but one tossed aside by life. Anyone meeting him for the first time would be likely to regard him as the most wretched of men.

³² According to the Justice Department, more than forty percent of the U.S. prison and jail population is African-American. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 19* (June 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf> (reporting that as of June 2009, of the 2,297,500 people incarcerated in state and federal prisons or jails, 841,000 are black men, and 64,800 are black women). According to the latest census, African-Americans make up 13.1% of the U.S. population. *USA State & County QuickFacts*, U.S. CENSUS BUREAU (Aug. 16, 2012), <http://quickfacts.census.gov/qfd/states/00000.html>.

³³ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 175 (2010).

³⁴ Babcock, *supra* note 13, at 184.

³⁵ The United States leads the world in incarceration with 2.2 million people currently in the nation’s prisons or jails—a 500% increase over the past thirty years. *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Aug. 5, 2011). As of December 2009, 1,524,513 people were in prison in the United States, and as of June 2009, 760,400 people in jail. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES 2009* (2012), available at <http://bjs.ojp.usdoj.gov/content/glance/corr2tab.cfm>. Our incarceration rate is six times greater than Canada, eight times greater than France, and twelve times greater than Japan. See David Cole, *Can Our Shameful Prisons be Reformed?*, N.Y. REVIEW OF BOOKS (Nov. 19, 2009),

I do. And so does every public defender in America—or at least they should.

I often tell students I became a criminal lawyer because I read the book *To Kill a Mockingbird* (and saw the movie version) too many times as an impressionable child.³⁷ For me, there is no more compelling figure than Atticus Finch, the archetypal criminal lawyer defending a wrongly accused poor black man.³⁸ That Gregory Peck played Finch in the movie only contributes to his iconic stature.³⁹

Criminal defenders are, by and large, poverty lawyers.⁴⁰ You can't spend any amount of time in criminal court and not see that it is a poor people's court.⁴¹ You can't step foot in a jail or prison and not notice they are full of poor people.⁴²

We are not very good at talking about poverty in this country.⁴³ We don't seem to want to acknowledge its existence.⁴⁴ But we must talk about poverty and

<http://www.nybooks.com/articles/archives/2009/nov/19/can-our-shameful-prisons-be-reformed/>.
Appallingly, we have a forty percent lead on our closest competitors, Russia and Belarus. *Id.*

In view of the numbers, it is not surprising that the critical focus tends to be on "mass incarceration." See generally ALEXANDER, *supra* note 33 (arguing that the disproportionate incarceration of people of color is a vestige of the deeply rooted racial caste system in the United States). However, we also have more people under the control of the criminal justice system than anywhere on earth. As of the latest count, a total of over 7.2 million people are in jail or prison or on probation or parole. BUREAU OF JUSTICE STATISTICS *supra*; see also PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009):

With far less notice, the number of people on probation or parole has skyrocketed to more than 5 million, up from 1.6 million just 25 years ago. This means that 1 in 45 adults in the United States is now under criminal justice supervision in the community, and that combined with those in prison and jail, a stunning 1 in every 31 adults, or 3.2%, is under some form of correctional control. The rates are drastically elevated for men (1 in 18) and blacks (1 in 11) and are even higher in some high-crime inner-city neighborhoods.

³⁶ PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 25 (2009).

³⁷ See SMITH, CASE OF A LIFETIME, *supra* note 2, at 29.

³⁸ See *id.* ("I wanted to be like Atticus Finch . . ."); see also Abbe Smith, *Defending Atticus Finch*, 14 LEGAL ETHICS 143, 144–45 (2011) (responding to Finch's critics and arguing that he is deservedly a criminal defense hero).

³⁹ A writer friend remarked about Gregory Peck's performance in the unremarkable western THE BIG COUNTRY (United Artists 1958) that Gregory Peck "beamed the same vibe he had in *Mockingbird*—an amazing ability to sustain a thoughtful, dignified expression with no dialogue for moment after moment. You feel the moral centre of the film swing his way and stay there." E-mail from Helen Garner, Australian author (on file with author).

⁴⁰ See Smith & Montross, *supra* note 15, at 456; Smith, *For Tom Joad and Tom Robinson*, *supra* note 15, at 884.

⁴¹ See Smith & Montross, *supra* note 15, at 457 ("[I]ndigent criminal defense lawyers labor in the lowest courts of the land, where the air is thick with worry and fear, and the halls are lined with the aggrieved and the adamant. This is clearly a gathering place for poor people; it has the smell and feel of so many places to which they are shunted.").

⁴² It remains as true today as it was when Clarence Darrow said it more than a hundred years ago: "The people who go to jail are almost always poor people . . ." Clarence Darrow, *Crime and Criminals: An Address to the Prisoners in the Cook County Jail*, in CRIME & CRIMINALS: ADDRESS TO THE PRISONERS IN THE COOK COUNTY JAIL & OTHER WRITINGS ON CRIME & PUNISHMENT 16 (2000).

⁴³ Notwithstanding the lack of public discourse on poverty in the United States, several excellent books on this subject have been published in recent years. See, e.g., JASON DEPARLE,

advocate for those who bear the brunt of it. In his final column for the *New York Times*, Bob Herbert decried the lack of concern about poverty and called the growing divide between rich and poor “scandalous.”⁴⁵ This is not hyperbole: in 2009, the richest 5% of Americans claimed nearly 64% of the nation’s wealth, while the bottom 80% held less than 13%.⁴⁶

I have never known poverty in any immediate sense. My own life could not be more different from that of most of my clients. I grew up with all kinds of advantages: no opportunities were beyond my reach. I am drawn to the poor because no one should be destitute and hungry, lacking decent housing, neighborhoods, schools, and medical care in the wealthiest nation on earth. I feel implicated by the inequality and unfairness of this.

The reverend Martin Luther King, Jr. could have been my kind of defender: “I choose to identify with the underprivileged. I choose to identify with the poor. I choose to give my life for the hungry. I choose to give my life for those who have been left out”⁴⁷

Eugene Debs could have been my kind of defender too:

[Y]ears ago I recognized my kinship with all living beings, and I made up my mind that I was not one bit better than the meanest on earth [W]hile there is a lower class, I am in it; while there is a criminal element I am of it; while there is a soul in prison, I am not free.⁴⁸

AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION’S DRIVE TO END WELFARE 39 (2004); BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001); MARK ROBERT RANK, *ONE NATION, UNDERPRIVILEGED: WHY AMERICAN POVERTY AFFECTS US ALL* (2004); DAVID SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2004).

⁴⁴ See generally Peter Edelman *Tries to Explain Poverty to Stephen Colbert*, AM. CONSTITUTION SOC’Y BLOG (July 28, 2011), <http://www.acslaw.org/acsblog/peter-edelman-tries-to-explain-poverty-to-stephen-colbert> (law professor Peter Edelman explaining to an incredulous Stephen Colbert that poverty exists in America).

⁴⁵ Bob Herbert, *Losing Our Way*, N.Y. TIMES, Mar. 26, 2011, at A23.

⁴⁶ *Id.* Herbert describes the current reality bluntly:

Nearly 14 million Americans are jobless and the outlook for many of them is grim. Since there is just one job available for every five individuals looking for work, four of the five are out of luck. Instead of a land of opportunity, the U.S. is increasingly becoming a place of limited expectations....

There is plenty of economic activity in the U.S., and plenty of wealth. But like greedy children, the folks at the top are seizing virtually all the marbles. Income and wealth inequality in the U.S. have reached stages that would make the third world blush. As the Economic Policy Institute has reported, the richest 10 percent of Americans received an unconscionable 100 percent of the average income growth in the years 2000 to 2007, the most recent extended period of economic expansion.

Americans behave as if this is somehow normal or acceptable. It shouldn’t be

Id.

⁴⁷ Martin Luther King, Jr., *Sermon to Ebenezer Church* (Aug. 28, 1966), in MARTIN LUTHER KING, JR.: A LIFE 191 (Marshall Frady ed., 2002).

⁴⁸ Eugene Debs, *Statement to the Court after being Convicted of Violating the Sedition Act*, United States District Court for the Northern District of Ohio, Cleveland, Ohio (Sept. 18, 1918), in THE TRIAL OF EUGENE DEBS 23 (Max Easten ed., 1918).

But I confess that I am also drawn to any underdog—the little guy, not the big one; David, not Goliath; the Cubs, not the Yankees. I often tell students that growing up a Chicago Cubs fan probably helped pave my life path.⁴⁹

The underdog is not necessarily poor or black. Delores and Ronnie, whose stories begin this essay, are white and were some version of middle-class before their incarceration. But if they are ever released, neither will have an easy time of it. Neither came from money, is college educated, or a skilled worker. Delores worked as a nurse's aide before her arrest and conviction. As a convicted murderer, it's doubtful she'd find employment as any sort of caretaker. Ronnie was a struggling high school student. He has never held a job outside the prison walls.

Moreover, some criminal justice underdogs were once top dogs.⁵⁰ That's the terrifying thing about a criminal prosecution—the once mighty can suddenly be brought low.⁵¹ Although I have represented very few non-indigent clients, the fear, anxiety, and vulnerability that accompany a criminal accusation transcend class.⁵²

⁴⁹ Clarence Darrow was also a diehard Chicago Cubs fan. See FARRELL, *supra* note 21, at 477 n.12.

⁵⁰ See MICHAEL CONNELLY, *THE REVERSAL* 221 (2010) ("The prosecutor was always the overdog. The Man.").

⁵¹ See Scott Turow, *Reasonable Doubt and the Strauss-Kahn Case*, NY TIMES, Aug. 28, 2011, at Sunday Review 4 (noting that former International Monetary Fund chief Dominique Strauss-Kahn was "trotted before cameras, unshaven and handcuffed"—in what is known as a "perp walk"—after his arrest for rape); see also Mike Scarcella, *Walk of Shame? The Strauss-Kahn case and the debate over perp walks*, NAT'L L.J., July 11, 2011, at 1:

Dominique Strauss-Kahn, disheveled and dour, his wrists cuffed behind his back, stood between police officers with badges askew on their navy blazers. On cue a scrum of reporters documented the spectacle.

The high official-turned-accused-sex-offender was taking his perp walk.

Within moments, the image was on the Web, and the next day, May 17, New York's two major tabloids filleted Strauss-Kahn, both running a version of the photo of the International Monetary Fund chief in handcuffs under guilty-as-sin headlines.

Then, of course, came the doubts.

There are many examples of this, including the arrest and conviction of investor Bernard Madoff for constructing the greatest Ponzi scheme in history. See Benjamin Weiser, *Madoff Judge Recalls Rationale for Imposing 150-Year Sentence*, N.Y. TIMES, June 29, 2011, at A1, A18 (Madoff calling his 150-year sentence for defrauding thousands of investors more fitting for "serial killers" than a white collar criminal, and suggesting the judge might as well have ordered a "stoning in the public square").

⁵² See BUTLER, *supra* note 36, at 9–10 (former prosecutor turned law professor Paul Butler describes the feeling of utter indignity during his own arrest.)

I was handcuffed and placed in the back of a squad car. I thought, this cannot be happening. It felt like one of those dreams professional people have where their most feared public humiliation comes true A few hours passed. The cell was so filthy I couldn't even sit on the metal bench. I just didn't trust those stains Then lunchtime. A courthouse employee came in, looked at me like I was a piece of shit, and literally threw a paper bag through the bars of my cell. Lunch meat, of uncertain origin, on white bread, and an apple. I was not hungry.

There's also something fun about fighting for the underdog in criminal court: the stakes are high, the battle hard-fought, the outcome uncertain.⁵³ The lines are also refreshingly clear. Defenders fight for underdogs against the enormous power of the State.⁵⁴ It's the Good Fight.

What's more, we have to be that much better—tougher, smarter, more creative, more resourceful—in order to level the playing field. As one writer puts it: "It's always a stacked deck for the state and often the defense attorney's very best work is simply not good enough to overcome the power and the might."⁵⁵ This can be frightening, but it is also exciting. Sometimes you can literally beat the government.⁵⁶ There's nothing more thrilling than this, nothing more intoxicating. The wins help keep you going.

But the thing about siding with the underdog is you don't always win—in fact mostly you don't—and it can be devastating when the government puts a human being under your care in a steel cage or kills them.⁵⁷ Each defender has to figure out a reason to continue the fight.⁵⁸

Id. at 9–10. See also SOL WACHTLER, *AFTER THE MADNESS* (1997) (former judge recounting his own prosecution).

⁵³ See Mills, *supra* note 13, at 58 (career public defender Martin Erdmann discussing his work).

⁵⁴ One prominent commentator has questioned this assertion. See William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707–08 (1993) (arguing that there is no powerful state, only "harassed, overworked bureaucrats"); but see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1735–36 (1993) (responding to Simon by pointing out that "[t]he state" is not just a group of harassed, overworked bureaucrats in the D.A.'s office. It is a group of harassed, overworked bureaucrats, backed by the police and able in many cases to immobilize their adversaries in cold concrete.").

⁵⁵ CONNELLY, *THE FIFTH WITNESS*, *supra* note 30, at 406. I have recently become a fan of Connelly. His portrayal of criminal defense lawyer Mickey Haller, the central character in *THE LINCOLN LAWYER* (2005), *THE BRASS VERDICT* (2008), *THE REVERSAL* (2010), and *THE FIFTH WITNESS* (2010), is among the most authentic in recent fiction. Haller has the sensibility of a public defender—which is where he began his career, see CONNELLY, *THE BRASS VERDICT*, *supra* at 4–27—even though his clients are sometimes well-off (wealthy L.A. realtor Louis Ross Roulet accused of assault and attempted murder in *The Lincoln Lawyer*, Hollywood mogul Walter Elliott in *The Brass Verdict*) and middle-class (accused murderer Lisa Trammel in *The Fifth Witness*). He seems to care most about indigent defendants (the wrongly convicted Jesus Menendez, whom Haller represented pro bono in *The Lincoln Lawyer*)—even those who are drug dealers and gangsters. Sadly, by the end of *The Fifth Witness*, he has had it with criminal defense and decides to run for District Attorney. See CONNELLY, *THE FIFTH WITNESS*, *supra* at 419. Maybe he is just trying to win back his prosecutor ex-wife (the only false note in the series, as most defenders are not romantically involved with prosecutors).

⁵⁶ By "beat the government," I mean obtain an acquittal at trial—the clearest kind of victory—but not only that. As a defense lawyer, you can also beat the government by getting a client into a diversionary program through which charges are dismissed, winning a pretrial motion, negotiating a favorable plea, or obtaining a good sentence.

⁵⁷ See CONNELLY, *THE REVERSAL*, *supra* note 50, at 221 (referring to the "burden" of the defense attorney—"who stands all alone and holds someone's freedom in his hands").

⁵⁸ See Smith, *Too Much Heart and Not Enough Heat*, *supra* note 15, at 1208 (arguing that respect, craft, and a sense of outrage motivate most long-term criminal lawyers).

IV. GUILTY PEOPLE

I like guilty people. I can't help myself. I just do. I prefer people who are flawed and complicated and do bad things to those who are irreproachable and uncomplicated and do the right thing. Flawed people are more interesting.

Take, for instance, Woody Allen. Although he is somewhat out of place in an essay on criminal defense—his various legal problems have never been in criminal court⁵⁹—he is a useful example. When fifty-five-year-old Allen left longtime romantic partner Mia Farrow for Farrow's twenty-one-year-old adopted daughter, Soon-Yi Previn,⁶⁰ many people, including Allen's fans, were enraged.⁶¹ The subsequent, very public custody battle between Allen and Farrow over their three children didn't help.⁶²

More than a few friends refused to see Allen's films during this period. Not me. First, could anyone think of Allen as a paragon of sexual virtue after watching his movies? The writing was on the wall in the movie *Manhattan*,⁶³ in which the forty-two-year-old, twice divorced comedy writer played by Woody Allen dates a seventeen-year-old girl played by Mariel Hemingway before he falls for his best friend's mistress. Second, alright, so he's kind of a pig in his personal life, but he's a genius at movie-making. Third, as my partner, Sally, says about me, I always "side with the perpetrator."

A less famous example is a recent client I'll call Renee Cooper. Ms. Cooper was African-American, in her mid-fifties, obese, toothless, and always panicking about something: how she was going to get to court, how she was going to get to the mental health clinic, the long lines at drug testing, and various family problems. Ms. Cooper had been in and out of trouble much of her life. She had a long "sheet" consisting mostly of petty offenses like drug possession and prostitution, but she had also done time for selling drugs—an inevitable outgrowth

⁵⁹ See C.J. Hughes, *For \$5 Million, Woody Allen Agrees to Drop Lawsuit*, N.Y. TIMES, May 19, 2009, at A21 (reporting a settlement in Allen's lawsuit against the American Apparel clothing company for using an image from the movie *Annie Hall* without permission); Richard Pérez-Peña, *Son's Letter Of Anguish Rivets Court In Allen Case*, N.Y. TIMES, Mar. 24, 1993, at B3 (reporting on the custody battle between Woody Allen and Mia Farrow over their three children); Joyce Wadler, *Public Lives: Woody Allen's Ex-Best Friend on the Record, Sort Of*, N.Y. TIMES, Sept. 20, 2002, at B3 (noting Woody Allen's lawsuit against his former best friend and film production partner Jean Doumanian, which settled for an undisclosed amount of money); but see Randy Kennedy, *Woody Allen Fails to Beat A Prosecutor*, N.Y. TIMES, Nov. 4, 1993, at B15 (reporting the dismissal of a complaint filed by Allen against a prosecutor who said there was probable cause to believe Allen had molested his seven-year-old daughter but declined to file charges).

⁶⁰ See Pérez-Peña, *supra* note 59.

⁶¹ See David Kemp, *Woody Talks*, N.Y. TIMES, Nov. 18, 2007, Book Review, at 1 (noting that people were "up in arms" about Allen's relationship with Soon-Yi Previn).

⁶² See Pérez-Peña, *supra* note 59 (showing that some of the personal revelations at trial were not flattering to Allen, to say the least).

⁶³ MANHATTAN (Jack Rollins & Charles H. Joffe Productions 1979).

of her long-standing addiction. She was doing well on parole and in mental health treatment when she “caught” a prostitution charge.⁶⁴

The facts of the case were depressing, memorable, and not in dispute. Ms. Cooper had offered to perform oral sex on an undercover police officer in exchange for fried chicken.⁶⁵ Ms. Cooper was only slightly humiliated to have been arrested under these circumstances. As far as she was concerned, she was hungry and a blow job in exchange for dinner seemed not a bad trade. But the arrest was a problem. It was a violation of her parole and meant she had to go to court on the new case.

We tried hard to get her to complete a mental health diversionary program⁶⁶—a “therapeutic,” treatment-oriented alternative to being prosecuted—so that Ms. Cooper might avoid a new conviction and parole violation. But she missed meetings, tested positive for drugs or “water loaded” a drug test,⁶⁷ and otherwise failed to comply with the requirements of diversion. So the mental health judge put her back on the regular criminal calendar.

This was not a case that was going to trial. Ms. Cooper was the first to say she would plead guilty and throw herself on the mercy of the court. Her goal was to stay out of jail. By some miracle, Ms. Cooper’s parole officer took pity on her and did not issue a violation report for the new crime. So the only thing we had to worry about was whether the judge before whom Ms. Cooper was scheduled to appear would send her to *jail* for doing something as desperate as offering a blow job for chicken—assuming Ms. Cooper was going to continue to test “dirty” or otherwise fall short on pretrial release.

I got a kick out of Ms. Cooper. She always greeted me with a big bear hug. She called me “Ms. Abbe.” She was funny and charming. She said she had heard of me and that I was known as a great lawyer. I doubted this.

Let me try to explain what I mean when I say, “I like guilty people.” The guilty people I have in mind are not those who commit acts of cruelty and violence

⁶⁴ See BUTLER, *supra* note 36, at 132 (noting that the expression “I caught a case”—popularized through hip-hop culture—reflects the arbitrary nature of criminal justice. A person “catches a case” in the same way as he or she might catch a cold).

⁶⁵ Contemplating the crime, one friend who lives by the *Zagat’s* restaurant guide had only one question: What kind of chicken was it?

⁶⁶ See generally Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003) (discussing criminal justice programs that “divert” cases from prosecution towards treatment); Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1613–15 (2012) (describing mental health diversion court in the Superior Court for the District of Columbia). For critical commentary on these kinds of programs and courts, see Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender’s Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2003).

⁶⁷ Water-loading is drinking too much water prior to a drug test so that whatever unlawful substance is in one’s urine is watered down.

so vicious it's painful to read a news story about them.⁶⁸ I'm talking about my clients, the vast majority of whom are not evil but who have committed crimes for a variety of reasons.⁶⁹

This may be what every defender says: *My* clients, no matter the despicable things they have done, aren't wicked, but damaged, deprived, or in distress. The reasons for their criminal conduct are sometimes complex and sometimes simple: growing up with drug addicted and neglectful or abusive parents, growing up in violent foster homes, being under the influence of drugs or alcohol when they committed the crime, being young and hot-headed and lacking in judgment, being poor and otherwise without resources, becoming out of control in a moment of rage, lacking good sense or not having the mental wherewithal to really understand the consequences of their actions, and sometimes "there is just a meanness in the world."⁷⁰

For the most part, my clients feel remorseful and ashamed—at least by the time they get to sentencing. If they don't or can't feel remorse it is generally not a matter of "character," but of conditions and context. As Clarence Darrow once said, "We are all poor, blind creatures bound hand and foot by the invisible chains of heredity and environment, doing pretty much what we have to do in a barbarous and cruel world. That's about all there is to any court case."⁷¹

⁶⁸ I am often asked about what sorts of clients or cases I could not defend. It's a good question. Although I have never turned down a court appointment based on the nature of the case, the kinds of cases that feel most abhorrent to me are child abductions that feature sexual abuse—see generally Mark Landler, *Austria Says Man, 73, Fathered And Jailed Daughter's Children*, N.Y. TIMES, Apr. 28, 2008, at A6 (reporting about the arrest of Josef Fritzl, who imprisoned his daughter Elisabeth in a basement dungeon for twenty-four years, where she had seven children); Jesse McKinley, *Couple Admit To Their Roles In Kidnapping Of 11-year-old*, N.Y. TIMES, Apr. 29, 2011, at A17 (reporting about the abduction of eleven-year-old Jaycee Dugard by convicted sex offender Philip Garrido and his wife Nancy, and her subsequent captivity in a secret backyard compound with two children she gave birth to); MICHAEL CONNELLY, *THE REVERSAL* 14 (2010) ("[T]here were certain kinds of evil in the world that had to be contained . . . A child killer was at the top of that list."); EMMA DONOGHUE, *ROOM: A NOVEL* (2010) (telling the story of an abduction from the point of view of the captive child born of the crime); ALICE SEBOLD, *THE LOVELY BONES* (2002) (telling the story of an abduction and murder from the teenage victim's point of view)—and hate crimes of all sorts. In other words, I have an especially hard time with rapists and racists.

⁶⁹ See CONNELLY, *THE LINCOLN LAWYER*, *supra* note 55, at 231:

[M]ost of the people I defend aren't evil . . . They're guilty, yeah, but they aren't evil. You know what I mean? There's a difference. You listen to them . . . and you know why they make the choices they make. People are just trying to get by, just to live with what they're given, and some of them aren't given a damn thing in the first place. But evil is something else.

See also BUTLER, *supra* note 36, at 18 (describing the woman whose false accusation landed him behind bars as more "pathetic" than "evil," and as not a "terrible human being" even though she "did a terrible thing").

⁷⁰ Bruce Springsteen, *Nebraska*, on NEBRASKA (Columbia Records 1982) ("They declared me unfit to live, said into that great void my soul'd be hurled, They wanted to know why I did what I did, I said Well sir I guess there's just a meanness in the world").

⁷¹ FARRELL, *supra* note 21, at 9 (internal quotation marks omitted).

Moreover, as Barbara Babcock has noted, the “image of the defense lawyer who uses daring courtroom skills and legal technicalities to free a homicidal maniac . . . is a fantasy almost never realized.”⁷² These cases are very hard to win. Most plead out.⁷³

Ms. Cooper was ultimately placed on probation, notwithstanding her less than perfect performance on pretrial release. The judge said the important thing was she had no new arrests. I think I wasn’t the only one charmed by Ms. Cooper.

Delores has no memory of hurting her babies. She has come to accept that she must have ended the life of the one child for whom she was convicted. She feels sorrow and regret and bewilderment. The bewilderment is not helpful, she realizes. It does not help her to call the crime “inexplicable,”—a tragedy she cannot begin to explain. A claim of postpartum depression won’t help either. She must try to “own” her crime. So my students and I push her. We suggest that perhaps out of terror and self-loathing—she might have seen herself as an essentially unfit mother because no child survived her care—she took this child’s life to save it from suffering. She does not know what to say to this.

Ronnie says he did a terrible thing when he was sixteen-years-old that he cannot undo. He would give anything to undo it. He doesn’t know why he did what he did; it still feels unreal. His whole life before prison is now a blur. He understands why he is being punished. He destroyed two families—his neighbor’s and his own. He has found some solace in his Christian faith—it holds out the promise of forgiveness.

The idea of forgiveness as a key defender sensibility is intriguing. I think defenders have to have a capacity for compassion and empathy,⁷⁴ and an ability to take in and respect the whole client⁷⁵—all of which might include some measure of forgiveness.⁷⁶ However, there might be a paradox here. An informal survey of defenders suggests that we may be better at forgiving clients for serious transgressions than we are at forgiving people in our own lives for petty indignities.

Defenders are also fundamentally curious. We are genuinely interested in flawed people. We need to understand them in a forgiving sort of way. As one of Clarence Darrow’s biographers said of him, “[Darrow] sought to make even the

⁷² Babcock, *supra* note 13, at 182.

⁷³ See *id.* (noting that the vast majority of those accused of crime plead guilty).

⁷⁴ See generally Ogletree, Jr., *supra* note 13, at 1242–43 (discussing the importance of empathy in criminal defense).

⁷⁵ See Smith, *Too Much Heart and Not Enough Heat*, *supra* note 15, at 1243–44 (discussing the importance of respect in criminal defense).

⁷⁶ This might be something that distinguishes defenders from prosecutors and judges. See CONNELLY, *supra* note 30, at 345 (criminal defense lawyer saying to his prosecutor ex-wife: “You’ll never completely forgive and forget, will you? It’s not in you and maybe it’s what makes you such a good prosecutor.”); FARRELL, *supra* note 21, at 8–9 (noting that in Victorian America, “haughty judges” and “lean and hungry prosecutors” knew “their duty”: “they were there to exact vengeance, and to safeguard property and propriety”).

most hideous of crimes comprehensible.... [For him] [t]here were no moral absolutes, no truth, and no justice. There was only mercy.”⁷⁷ As Darrow himself said:

Strange as it may seem, I grew to like to defend men and women charged with crime. It soon came to be something more than the winning or losing of a case. I sought to learn why one man goes one way and another takes an entirely different road. I became vitally interested in the causes of human conduct. This meant more than the quibbling with lawyers and juries, to get or keep money for a client so that I could take part of what I won or saved for him: I was dealing with life, with its hopes and fears, its aspirations and despairs. With me it was going to the foundation of motive and conduct and adjustments for human beings, instead of blindly talking of hatred and vengeance, and that subtle, indefinable quality that men call “justice” and of which nothing really is known.⁷⁸

There are cases that sicken me, of course—crimes that turn my stomach.⁷⁹ Frankly, the presentence report in Ronnie’s case was difficult to read. Over the years there have been a handful of cases that have tested me: sympathetic victims, unspeakably cruel crimes, and clients who seem to lack a conscience. But I strongly believe that everyone has an absolute right to a defense no matter how vicious their crime. And whatever the peculiar makeup is of a defense lawyer,⁸⁰ I seem to be well suited for the task.

The other thing about representing the guilty is that you always win—if you define winning creatively enough. Keeping the jury out for more than twenty minutes is a win. Making the prosecution respond to arguments that divert attention from the government’s case—the proverbial “red herring”—is a win. Giving your client his or her day in court is a win.

Moreover, if you actually *win* at trial on behalf of a factually guilty client, you’re a genius. You’ve accomplished a remarkable feat of derring-do. You are greeted back at the office with back slaps and high-fives like a baseball player who just hit a grand slam.⁸¹ And if you don’t win, there are ready condolences: the

⁷⁷ FARRELL, *supra* note 21, at 9.

⁷⁸ CLARENCE DARROW, *THE STORY OF MY LIFE* 75–76 (1932).

⁷⁹ *See supra* note 68.

⁸⁰ *See* Babcock, *supra* note 13, at 175 (“[I]t’s not for everybody. Criminal defense work takes a peculiar mind-set, heart-set, soul-set.”) (internal quotation marks omitted).

⁸¹ *See* CONNELLY, *supra* note 50, at 6 (“[T]here are so few victories from the defense side of the bar that there is always a sense of communal joy in the success of others and the defeat of the establishment.”).

evidence was overwhelming, nobody could have won that case, you tried the hell out of the case, the jury had no choice but to convict.⁸²

Of course, we also come to believe in our guilty clients—in their humanity and their fundamental worth as a person—and want to get them off. Their guilt becomes irrelevant—a non-issue. Moreover, by the time of trial, we have usually convinced ourselves that they are not guilty at all.⁸³

Frankly, most defenders would take a guilty person over an innocent one any day. You wouldn't wish an innocent client on your worst enemy—there is nothing more “grueling,” “frightening,” or “desperate” than defending an innocent.⁸⁴ Defending the guilty is tough enough.

I also think defenders have to like, or at least recognize the humanity of guilty people, because that's what we do. We defend the guilty.⁸⁵ Most of our clients are guilty of something—even if it's not always what they're charged with.⁸⁶ I have taken to describing what I do as “The Guilty Project” both to candidly convey what criminal defense is and to distinguish it from increasingly prevalent and popular “Innocence Projects.”⁸⁷

⁸² See Babcock, *supra* note 13, at 180 (“[I]t is far easier to defend the guilty because the defense lawyer always wins. If the defendant is acquitted, the lawyer has worked a minor miracle; if convicted, the correct result was reached.”).

⁸³ See *id.* (“Most defense lawyers have reached a state of reasonable doubt in their own minds by the time of trial.”). See also Monroe H. Freedman, *The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966) (“Criminal defense lawyers do not win their cases by arguing reasonable doubt. Effective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent.”); John B. Mitchell, *The Ethics of the Criminal Defense Attorney: New Answers to Old Questions*, 32 STAN. L. REV. 293, 297 n.12 (1980) (“I am never convinced beyond a reasonable doubt of someone's factual guilt unless they admit their crime to me under reliable circumstances.”).

⁸⁴ Babcock, *supra* note 13, at 180; see also CONNELLY, *THE LINCOLN LAWYER*, *supra* note 55 (epigraph attributed to the main character's father: “There is no client as scary as an innocent man”).

⁸⁵ Babcock, *supra* note 13, at 177–79. I consider Babcock's article, *Defending the Guilty*, to be the best thing ever written on the subject. She offers five different reasons for defending the guilty: the “Garbage Collector's Reason” (it's “dirty work” but someone has to do it, the adversary system requires lawyers on both sides); the “Legalistic or Positivist's Reason” (truth cannot be known, guilt is a legal conclusion); the “Political Activist's Reason” (most of those who commit crime have themselves suffered injustice and oppression, imprisonment is barbaric); the “humanitarian” or “Social Worker's Reason” (most criminals are disadvantaged and ought to be treated with humanity and respect, which can promote rehabilitation); and the “Egotist's Reason” (criminal defense is more interesting, challenging, and fun than other legal work).

⁸⁶ See CONNELLY, *THE LINCOLN LAWYER*, *supra* note 55, at 25 (“I didn't deal in guilt and innocence, because everybody was guilty. Of something.”).

⁸⁷ See generally Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315 (2010).

V. CHALLENGING AUTHORITY

The opportunity to challenge authority on behalf of another—in fact, the duty to do so—is oddly satisfying and somehow freeing. It doesn't feel that way when I have to confront authority on my own behalf. Then I fold like a cheap tent. But for a client, I am easily indignant and outraged. I tone it down because those feelings are not necessarily the most effective advocacy. But I am happy to go toe-to-toe with prosecutors, police officers, probation officers, and parole officers for a client if I have to—likewise with judges: I am willing to court contempt if need be.

People with authority seldom wield it well. This may be especially true in the criminal justice system. Even the judges and prosecutors I like—and there is a small handful—can't help becoming arrogant.⁸⁸ This is probably an occupational hazard. They hold the keys and the rest of us are supplicants. It goes to their heads.

Among the most irritating authority figures are those with a tiny pocket of power who feel compelled to brandish it: court clerks who won't call your case no matter how nicely you ask, court bailiffs who "shush" you, and corrections officers who go out of their way to be unpleasant and unhelpful. Are officious and self-important people drawn to these jobs or do the jobs make them officious and self-important?

When I visited Ronnie for the first time, I did the usual due diligence. I had never been to this prison before and wanted no problem getting in. Every prison has its own rules and regulations. Some prisons have limited hours, even for legal visits. Some prisons don't let you wear certain clothing or colors. Some don't allow you to give anything to or receive anything from prisoners—even legal documents. I was from out of state and wanted to make sure my bar card would be honored or, if not, how to arrange a non-legal visit.

I called the prison and spoke to one of the deputy superintendents. I had the office manager at the clinic make a similar call to double-check. The post-graduate fellow who was coming with me did his own checking. We also reviewed the legal visit rules online. We were assured there would be no problem. All we had to do was send in a copy of an up-to-date bar card and driver's license.

We got to the prison—about an hour and a half drive—on the Friday of a holiday weekend. We got there early because my son was playing in a baseball tournament later that afternoon and I wanted to make sure I'd be finished in time. When we walked into the outer room of the visiting area everything looked as it should, except for one thing. Taped to the metal detector was a flyer that read: YOU WILL RECEIVE TWO ATTEMPTS TO PASS THROUGH THE METAL

⁸⁸ See Turow, *supra* note 51 (former prosecutor noting that "[p]rosecutorial intransigence, a galling inability to acknowledge that initial judgments were incorrect" is a hallmark of wrongful convictions); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 815 (2001) (noting that "egocentric biases may make it hard for judges to recognize that they can and do make mistakes").

DETECTOR MACHINE. IF YOU DO NOT CLEAR YOU WILL BE PROHIBITED FROM VISITING.

Now, here was the problem: I was wearing an underwire bra. This is the sort of thing that tends to set off metal detectors. I was perfectly prepared to be “wanded” (to have one of the corrections officers use a hand-held detecting wand) or hand-searched, if the detector signaled the presence of metal. This is what happens in court (sometimes on a daily basis) and in other jails and prisons. But I had never encountered a jail or prison that relied entirely on a machine. Frankly, my dental work might set off a metal detector.

I told the corrections officer in charge of the visiting room that I was concerned. I had called the warden’s office and expressly asked whether there was anything unusual about getting into this prison. But I had been told nothing about this metal detector rule. The corrections officer said that, in fact, the flyer taped to the machine was wrong and visitors were entitled to only one pass through the metal detector, and if it went off the visitor would be prohibited from entering the prison.

I asked to see a supervisor.

While I was waiting, a large, heavily tattooed woman in her thirties and her six-year-old daughter came into the visiting area. They were coming to see the woman’s fiancé (in jails, prisons, and courthouses, everyone is suddenly a “fiancé”). An older woman was with them—maybe the fiancé’s mother. The little girl and the older woman both sailed through the metal detector with no problem. But the thing went off when the tattooed woman walked through. She protested that she had no metal on her of any kind and had driven four hours to get there. The corrections officer in charge was unmoved and said she would not be allowed in.

The woman sat down and wept. After a few minutes she said, “Please. Please let me in.” The officer ignored her. She wept some more and said, “Please. Please let me in.” This went on for some time—the woman crying and begging to be let in. It was distressing to me but seemed to have no effect on the officer.

Eventually a supervisor came. She was pleasant. She said I might be getting worked up for no reason and suggested I take off what little jewelry I had on—a couple of silver rings, some small hoop earrings—and see what happens. She said the other officer was wrong about getting only one try and that I was entitled to two times through, just like the flyer said. I said, “Okay,” and did as she suggested. But the machine buzzed when I walked through.

I turned to the supervisor. “What now?” I asked. “You’re not getting in with that bra,” she said.

So I walked out to the parking lot, took my bra off—to the enjoyment of the man sitting in a car next to mine—and threw it in my trunk. Then I walked back to the visiting area and was met by the post-graduate fellow who had accompanied me. “You won’t believe this,” he said. “What?” I asked. He looked like he didn’t want to tell me. “Now they’re not going to let you in because you’re wearing no undergarments.”

You can't make this stuff up.

I walked back into the visiting area. I wanted to say any number of things but the only sign as prominent as the one on the metal detector was one that read: ANY PROFANITY OR ABUSIVE LANGUAGE DIRECTED AT CORRECTIONS STAFF WILL RESULT IN LOSS OF VISITING PRIVILEGES. So I held my tongue. I asked whether they were *trying* to humiliate me. I asked to see another supervisor. And then another.

I would have left except for the fact that Ronnie was expecting us. He hadn't seen a lawyer in twenty-five years. I couldn't bear to disappoint him.

Eventually we got in to see him. I was hopelessly late to my son's tournament.

Worse still were the conditions of the visit. Legal visits at this particular prison were conducted in an enclosed Plexiglass booth with a telephone on either side. In other words, there was no physical contact whatsoever. I don't know why my bra was so important under these circumstances.

But it's a good story and it makes the point about how defenders have to constantly take on authority.

It is also a sobering lesson about prisons. If this is how corrections officers treat fifty-year-old lawyers, (and they knew I was also a law professor) imagine how they treat people on the inside. My clients don't stand a chance.

VI. WHAT'S HARD ABOUT IT

For all of these reasons—the fact that I'm drawn to people in trouble, underdogs, and the guilty, and I enjoy challenging authority—I am what might be called a natural defender. But that doesn't mean there's nothing hard about it. There is plenty that's hard about it.

The hardest part is the randomness of justice and the pervasiveness of injustice. Too much depends on the luck of the draw: which lawyer, prosecutor, judge, or jury you happen to get. And too much depends on the resources of the accused. Nearly fifty years after *Gideon*,⁸⁹ there is still a rich man's justice and a poor man's justice in much of the country.⁹⁰

Prosecutors have too much power and lack compassion.⁹¹ Judges have too much power and lack compassion.⁹² (Oh sure, they have compassion for complainants. I mean compassion for *my people*.)

⁸⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (landmark case requiring the appointment of counsel in criminal cases).

⁹⁰ See generally NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> (blue ribbon commission reporting on the current state of indigent criminal defense in the United States).

⁹¹ See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001) (discussing the ethos of prosecution under current conditions and whether "good" people should be prosecutors); BUTLER, *supra* note 33, at 101–21.

Then there is the harshness of punishment, often after terribly harsh lives.

I have already acknowledged that horrific crimes, sympathetic victims, and unsympathetic clients can also make the work difficult. This is true notwithstanding my commitment to zealous defense for all.

At the risk of sounding shallow, I am going to offer one more thing that has become increasingly hard: the endless, constant waiting in court, at the jail, and at prisons—usually after a desperate rush to be on time. I don't want to suggest that "the waiting is the hardest part."⁹³ It obviously can't compare to the tragic circumstances under which we meet our clients, the routine injustice, or the ravages of urban poverty. But the older I get, the harder it is.

VII. CONCLUSION

In her classic article on criminal defense, Barbara Babcock concludes that the real question is not "How can you defend the guilty?" but "Why *don't* you defend the guilty?"⁹⁴ She means two things by this. First, that lawyers who are supposed to be defending the accused often fail to do so because of crushing caseloads and lack of resources.⁹⁵ Second, that there should be more lawyers doing criminal defense.⁹⁶ Babcock believes that the criminal justice system and the legal profession would be better off if more lawyers did criminal work.⁹⁷

All of this is true. But I would add one more thing: There is nothing more stimulating, fun, challenging, and rewarding than representing people accused or convicted of crime.

⁹² See Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483 (2004) (discussing judges from a defense perspective).

⁹³ TOM PETTY AND THE HEARTBREAKERS, *The Waiting, on HARD PROMISES* (MCA Records 1981).

⁹⁴ Babcock, *supra* note 13, at 182.

⁹⁶ See *id.* ("Overburdened defense lawyers, without investigation or preparation, arrange for the going rates on cases, and trade one off against the other. The appropriate question for many defense lawyers becomes 'How can you participate in such a process?'"). Babcock also notes that the prevalence of guilty pleas makes the "existence of an adversary system designed to protect precious rights while determining individual guilt" a "popular myth." Instead, she says, we have "a bureaucratic mill grinding out guilty pleas for all. *Id.*

⁹⁷ *Id.* at 184 ("There simply should be more lawyers doing defense work. These could be drawn both from expanded public defender offices and from the litigating bar generally.").

⁹⁸ See *id.* ("If there were a large base of lawyers willing to represent the criminally accused, the question of how one defends the guilty would be subsumed in the greater question of what lawyers' work is about. This is where the question belongs.").

